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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PHILADELPHIA REINSURANCE CORPORATION; ASSICURAZIONI GENERALI; EXCESS AND CASUALTY REINSURANCE ASSOCIATION; AND THE REINSURANCE CORPORATION OF NEW YORK,

Petitioners,

v.

THE NORTH RIVER INSURANCE COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an order directing arbitration to proceed under Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, must be immediately appealed under Section 16(a)(3) of the FAA, 9 U.S.C. § 16(a)(3), if entered in a so-called "independent action"—an action brought solely to compel arbitration.

2. Whether the law of the case doctrine or Section 10 of the FAA, 9 U.S.C. § 10, precludes a district court from vacating an arbitration award before a final judgment is entered where the legal basis for the court's earlier ruling compelling arbitration on terms and conditions inconsistent with the terms of the agreement to arbitrate was overturned by the court of appeals during the pendency of the arbitration.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The Appellees in the Second Circuit are Philadelphia Reinsurance Corporation; Assicurazioni Generali; Excess and Casualty Reinsurance Association; and Underwriters and Underwriting Syndicates at Lloyd's and Foreign Companies Subscribing to Second Excess of Loss Reinsurance Contract No. R64939. The Intervenor-Appellee in the Second Circuit is The Reinsurance Corporation of New York. The Appellant in the Second Circuit is The North River Insurance Company.

The Petitioners here are Philadelphia Reinsurance Corporation; Assicurazioni Generali; Excess and Casualty Reinsurance Association; and The Reinsurance Corporation of New York. Underwriters and Underwriting Syndicates at Lloyd's and Foreign Companies Subscribing to Second Excess of Loss Reinsurance Contract No. R64939 have filed a separate Petition for Writ of Certiorari.

Petitioners' corporate parents and nonwholly owned subsidiaries are as follows:

> The ultimate parent of Philadelphia Reinsurance Corporation is Nationale-Nederlanden International B.V., a Netherlands Corporation.
>
> Assicurazioni Generali is an Italian corporation.
>
> Excess and Casualty Reinsurance Association ("ECRA") is a reinsurance pool comprised of a number of insurance and reinsurance companies. Those members whose parent companies, subsidiaries or affiliates have issued shares to the public are as follows:
>
> > The parent of Aetna Casualty and Surety Company is Aetna Life and Casualty Company, which has issued shares to the public.
> >
> > The parent of American Home Assurance Company and National Union Fire Insurance

Company of Pittsburgh, and the ultimate parent of New Hampshire Insurance Company, is American International Group, Inc., which has issued shares to the public.

The parent of Argonaut Insurance Company is Argonaut Group, Inc., which has issued shares to the public.

Continental Casualty Company is a wholly owned subsidiary of CNA Financial Corporation, which has issued shares to the public; Loews Corporation, which has also issued shares to the public, owns a majority of the shares of CNA Financial Corporation.

The parent of Continental Insurance Company is The Continental Corporation, which has issued shares to the public.

The ultimate parent of Associates Insurance Company is Ford Motor Company, which has issued shares to the public.

The parent of The Hanover Insurance Company is Allmerica Property and Casualty Companies, Inc., which has issued shares to the public.

The parent of Home Insurance Company is Home Holdings, Inc., which has issued shares to the public.

The ultimate parent of Insurance Company of North America and CIGNA Property & Casualty Insurance Company is CIGNA Corporation, which has issued shares to the public.

The ultimate parent of General Star National Insurance Company is General Re Corporation, which has issued shares to the public.

The parent of Northeastern Insurance Company of Hartford is USLICO Corporation, which has issued shares to the public.

The parent of Northwestern National Insurance Company is Armco, Inc., which has issued shares to the public.

The ultimate parent of Reliance Insurance Company is Reliance Group Holdings, Inc., which has issued shares to the public.

The parent of Security Insurance Company of Hartford is Orion Capital Corporation, which has issued shares to the public.

The parent of U.S. Fidelity & Guaranty Company is USF&G Corporation, which has issued shares to the public.

The ultimate parent of U.S. Fire Insurance Company is Xerox Corporation, which has issued shares to the public.

Those members of ECRA that are foreign corporations or whose parent companies, subsidiaries or affiliates are foreign corporations are as follows:

The ultimate parent of Employers Commercial Union Insurance Company is Commercial Union, plc, a British corporation.

The parent of General Accident Fire and Life, plc is General Accident, plc, a Scottish corporation.

The parent of Ranger Insurance Company is Fairfax Financial Holdings, Ltd., a Canadian corporation which has issued shares to the public.

Royal Insurance Company, Ltd., is a British corporation.

The ultimate parent of The Reinsurance Corporation of New York is Chartwell Re Corp., which has issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Philadelphia Reinsurance Corporation; Assicurazioni Generali; Excess and Casualty Reinsurance Association; and The Reinsurance Corporation of New York (collectively, the "U.S. Reinsurers") petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit which reversed the order of the United States District Court for

the Southern District of New York vacating an arbitration award.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. A, pp. 1a-12a) is reported at 63 F.3d 160. The opinion of the District Court for the Southern District of New York vacating the arbitration award (App. B, pp. 13a-24a) is reported at 856 F. Supp. 350.

JURISDICTION

The decision of the Court of Appeals was rendered on August 24, 1995. A timely petition for rehearing and suggestion for rehearing *in banc* was denied on October 18, 1995 (App. E, pp. 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are certain provisions of the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. §§ 1-16. The FAA is reproduced in Appendix G, pp. 35a-43a.

STATEMENT OF THE CASE

This case concerns (1) the appropriate construction of Section 16 of the FAA, which governs appeals from orders relating to arbitration; and (2) a district court's power to alter its earlier decisions relating to arbitration, either under Section 10 of the FAA or as an exception to the law of the case doctrine, when no final judgment has issued and there has been a significant change in the law of the circuit.

Petitioners (also called the "U.S. Reinsurers" because they accepted their share of the reinsurance at issue through offices located in the United States) are reinsurers—entities that assume all or part of specified risks accepted in the first instance by direct insurers. In this case, Petitioners and other domestic and London Market reinsurers (also called the "London Reinsurers" because

they accepted their share of the reinsurance at issue through offices located in London) reinsured Respondent The North River Insurance Company ("North River") under six separate reinsurance treaties that together covered three separate years and two separate dollar layers of risk.

A reinsurance treaty involves an ongoing contractual relationship between the primary insurer and the reinsurer in which the reinsurer agrees to indemnify the insurer for a portion of the insurer's liability in a designated line of business. Each reinsurer accepts a percentage of the total liability under a single treaty. In this case, as is typical, the reinsurers' acceptance of liability was on a several rather than joint basis (App. B, p. 20a) with the resulting arrangement constituting a number of separate contracts between North River on the one hand and, on the other, each reinsurer for its individually designated percentage of the total treaty liability (App. B, p. 20a). Among the six treaties at issue between North River and the U.S. and London Reinsurers, there was no single treaty on which all of these reinsurers participated. The London Reinsurers were parties only to the so-called "second layer treaties" which provided $4 million of coverage in excess of $1 million per occurrence. Moreover, the London Reinsurers' treaties contained an aggregate endorsement, not present in the U.S. Reinsurers' treaties, that directly bore on the issue addressed in the arbitration between North River and the U.S. and London Reinsurers—how North River could combine claims under its original policies and submit them to reinsurers.

North River submitted claims for reimbursement of amounts paid under an original policy issued to the GAF Corporation ("GAF") to both Petitioners and the London Reinsurers. Each rejected those claims on the ground that the treaties did not permit North River to combine all of its payments to GAF for purposes of exceeding the retention or deductible applicable to recovery under the treaties. The aggregate endorsement which applied only

to the London Reinsurers further complicated the disputes (App. A, p. 3a).

The Arbitration Proceedings

Respondent initiated arbitration proceedings against Petitioners in December 1988 and in October 1989 served a notice of intention to arbitrate on the London Reinsurers (App. A, p. 3a). While each treaty contained an arbitration clause, nothing in those arbitration clauses provided for consolidation of separate arbitrations instituted against different reinsurers under the treaties. These Petitioners had no objection to arbitration and voluntarily agreed to a joint hearing of the dispute involving only the U.S. Reinsurer group. However, both the London Reinsurers and Petitioners refused North River's demands for consolidation of the two separate proceedings (App. A, p. 4a). In 1991, North River sued under Sections 4 and 5 of the FAA, 9 U.S.C. §§ 4-5, seeking consolidation as well as appointment of an independent arbitrator or umpire to preside over the consolidated arbitration sought by North River.

Despite the U.S. and London Reinsurers' opposition to consolidated arbitration proceedings, the District Court ordered consolidation of these separate arbitrations (App. D, pp. 27a-30a). The District Court held, based on *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) ("*Nereus*"), that regardless of the contract between the parties, it could order consolidation of otherwise separate arbitrations, based on the liberal purposes of the FAA and the Federal Rules of Civil Procedure (App. D, p. 28a). The District Court retained jurisdiction. Six weeks after entering the consolidation order, the District Court entered another order appointing an umpire (App. C, pp. 25a-26a). The District Court never entered a final judgment, instead placing the matter on the suspense docket and "retain[ing] jurisdiction in the event of any post-award proceedings" (App.

C, p. 26a). Neither Petitioners nor the London Reinsurers appealed the consolidation order as a final decision or sought leave from the District Court to file an interlocutory appeal.

The Post-Award Proceedings

The arbitration was held in July 1993, and in October 1993, the arbitration panel issued a 2-1 award in North River's favor (App. A, p. 4a). A few days before the hearing began, unbeknownst to Petitioners, the Court of Appeals for the Second Circuit overruled *Nereus*, the decision relied on by the District Court to order consolidation of the separate arbitrations, on the ground that "recent Supreme Court case law has undermined our previous conclusion that the FAA's 'liberal purposes' and the Federal Rules of Civil Procedure allow us to consolidate arbitration proceedings absent consent." *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 71 (2d Cir. 1993) ("*Boeing*"). North River moved before the District Court which had retained jurisdiction to confirm the arbitration award in its favor, and the Petitioners and the London Reinsurers cross-moved to vacate the award on several grounds, including the *Boeing* decision which held that consolidation of separate arbitrations was improper absent consent of the parties (App. A, pp. 4a-5a).

The District Court vacated the arbitration award (App. B, pp. 13a-24a) on the ground that the *Boeing* decision had overruled the District Court's only basis for ordering consolidated arbitrations (App. B, p. 19a). Accordingly, it never reached the other issues presented as grounds to vacate the award (App. B, p. 24a). The District Court held that nothing in the record would sustain the notion that Petitioners and the London Reinsurers had consented to consolidation in the treaties or otherwise (App. B, p. 20a) and that there was no principled way to distinguish the case from *Boeing* (App. B, p. 21a). The District Court found that the Petitioners were not procedurally

barred from raising the issue of improper consolidation by failing to appeal from the District Court's order requiring consolidation, holding that "the 1988 amendments to the FAA, 9 U.S.C. § 16, cast doubt on the appealability of this Court's prior orders" (App. B, p. 22a). Moreover, the District Court stated that it always had power to revisit earlier rulings in a pending case where a fundamental change in governing law impacts directly on the parties' rights and obligations (App. B, p. 22a). Accordingly, the District Court vacated the award and directed the parties to proceed with separate arbitrations.

The Second Circuit's Reversal of the District Court

North River appealed the District Court's decision. The Court of Appeals reversed 3-0, holding that *Boeing* did not change the law of the Circuit, that the reinsurers' failure to appeal the 1991 decision consolidating the arbitrations at the time it was decided was fatal error, and that the balance of the equities required the award to stand. According to the panel, the District Court abused its discretion by reopening and changing its 1991 consolidation order (App. A, p. 2a). The Court of Appeals reasoned that this case "fits squarely within the definition of an 'independent proceeding' " (App. A, p. 6a) and that, accordingly, the order compelling consolidation was final and immediately appealable in 1991, even though the District Court had retained jurisdiction (App. A, p. 7a). Moreover, the Second Circuit panel held the District Court erred in departing from the law of the case for several reasons. First, the Court of Appeals said that *Boeing* did not truly change the law because *Boeing* relied on several Supreme Court decisions handed down after *Nereus* (App. A, p. 10a). Second, despite *Boeing*'s explicit language, the Court of Appeals stated, "[i]n a very real sense, *Boeing* did not overrule *Nereus*" (App. A, p. 10a), in part because the *Boeing* court did not disturb *Nereus* to the extent it relied on

general principles of equity and contract law (App. A, p. 10a). Thus, the Court of Appeals reasoned, "*Boeing* . . . explicitly left *Nereus* untouched to the extent that it relied on the equitable powers of the court" (App. A, p. 11a). The Court of Appeals concluded that the equities here required the award to stand. *Id.*

REASONS FOR GRANTING THE WRIT

The Second Circuit's opinion in this case represents a blatant example of the recurring problems caused throughout the circuits by the construction of § 16 of the FAA. While immediate appeals of orders issued in "independent" actions are permitted, appeals of orders issued in "embedded" actions must await the conclusion of the proceeding. It is unclear at best as to when an action is really independent or embedded. This confusion has wreaked havoc on litigants such as Petitioners who must, according to the rule the Second Circuit has established in this case, appeal every order compelling arbitration at the time it is rendered, even when it is not clear that it is appealable, thereby adding to the appellate courts' already overburdened workloads and imposing substantial and unnecessary costs on parties seeking to use the arbitration process. A litigant failing to undertake such an appeal runs the risk that at a later time, a court will determine that the order to arbitrate should have been appealed at the outset, and that the failure to do so is a waiver of the issue. And regardless of whether the law changes while the case is extant, the litigant apparently obtains no benefit from a change in law under the logic put forward by the Second Circuit, even though earlier court orders may directly conflict with the terms of the contract upon which an arbitration is based. This kind of ruling puts a substantial brake on the encouraging trend of the federal courts to promote alternative dispute resolution. Indeed, the Second Circuit's decision in this case conflicts with its own precedent and that of other circuits and this Court on the issue of when a court

may exercise its "equitable powers" and disregard the parties' wishes as expressed in the parties' agreement to arbitrate.

Petitioners respectfully suggest to the Court that this case presents urgent questions for resolution by this Court, questions which, if unanswered, will continue these peculiarities that do not have a sound legal basis and which have imposed significant costs and delays on the arbitration process.

I. SECTION 16(a)(3) OF THE FAA, AS INTERPRETED BY THE LOWER COURTS, IS CAUSING CONFUSION AS TO WHEN A DECISION IS APPEALABLE.

Section 16 is biased toward promoting arbitration. However, section 16(a)(3) of the FAA, 9 U.S.C. § 16(a)(3), provides that an appeal may be taken from "a *final decision* with respect to an arbitration that is subject to this title." (Emphasis supplied.) The words "final decision" create the essential quandary in the present case stemming from the outdated distinction between "embedded" and "independent" actions under the FAA, a quandary Section 16 was supposed to resolve.

Sections 16(a)(1) and (2) permit immediate appeals only from orders denying arbitration. Despite the pro-arbitration policy choice evident on the face of the statute, the lower courts in general and the Second Circuit in particular have essentially ignored that policy choice and instead opted to continue an outmoded and practicably unworkable distinction.

In this case, the Second Circuit reasoned that the institution of the case seeking arbitration was an "independent" action—an action only seeking arbitration (App. A, p. 6a). Thus, according to the Second Circuit, the order requiring consolidation (or perhaps the order appointing the umpire that was issued six weeks later) was a "final decision" from which an appeal should have been taken

under § 16(a)(3). The Second Circuit has reasoned that § 16 was not intended to change pre-existing law, holding that an order to arbitrate in an "independent" action is immediately appealable, while such an order in an "embedded" action, for example one seeking a declaratory judgment, as well as arbitration, is not. *See, e.g., Matter of Chung and President Enters. Corp.*, 943 F.2d 225, 228 (2d Cir. 1991). The legislative history of § 16, as is usually the case, is inconclusive, *see, e.g.*, 134 Cong. Rec. S16309 (daily ed. Oct. 14, 1988) (section-by-section analysis of 1988 amendments, submitted in lieu of Committee Report), and the statute on its face gives no indication that its intention was to continue the "independent-embedded" framework. Indeed, academic analysis of Section 16(a)(3) has divined no such intention.

> Given the nature of such orders, with the ever-present possibility of a return to court, an imaginative court of appeals might well hold that, unless the lower court makes clear that it intends to surrender all jurisdiction with its order to compel arbitration, it will be held not to have done so, and that the order is not therefore a final order for purposes of appeal.
>
> —4 Ian R. MacNeil, et al., *Federal Arbitration Law* § 43.2.5 at 43:32-43:33 (1994).

See also David D. Siegel, *Appeals from Arbitrability Determinations Under the New § 15 of the U.S. Arbitration Act*, 126 F.R.D. 589, 591 (1989) (Section 16(a)(3) may have meant to assure that only a final award is appealable); 15B Charles A. Wright, et al., *Federal Practice and Procedure* § 3914.17 at 25 (3d ed. 1992) ("The policy reflected in [§ 16(b) of the FAA] would be well served by denying appeal from any order compelling arbitration until the arbitration has been completed.").

A. The Independent-Embedded Distinction Wreaks Constant Confusion and Leads to Inconsistent Results.

As Petitioners discuss below, the proper role of § 16(a)(3) in the scheme of appealability of orders relating to arbitration is confused across the circuits. In the present case, however, there can be no doubt that the Second Circuit's decision worked a manifest injustice and was directly contrary to the rules of law concerning the FAA that this Court has established in recent years.

The FAA is merely intended to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("*Byrd*"). The FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms," *Volt Info. Sciences v. Board of Trustees*, 489 U.S. 468, 478 (1989), "even if the result is 'piecemeal' litigation," *Byrd*, 470 U.S. at 221.

Despite this precedent, Second Circuit courts, until *Boeing*, had routinely held that regardless of the terms of the agreement between the parties, the court could always order consolidation of otherwise separate arbitrations because of the liberal rules of the FAA and in reliance on the Federal Rules of Civil Procedure. *Boeing*, 998 F.2d at 71. *Boeing* itself catalogued those decisions, and they included *this case*. *Id.* at 71-72 n.1. The *Boeing* court noted that "each of our sister circuit courts that has considered the question since [recent] Supreme Court decisions has held that district courts do not have the authority under the FAA to consolidate arbitrations *absent the parties' consent*." *Id.* at 72 (footnote omitted) (emphasis supplied).[1]

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[1] The Courts in the Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have interpreted the FAA to require that separate arbitrations not be consolidated in the absence of agreement by the

Here, in this "independent action" brought in 1991, before *Boeing*, Respondent sought consolidation and appointment of an umpire. The reinsurance treaties did not require consolidation, and Petitioners actively opposed consolidation. That consolidation caused prejudice to Petitioners, a point which the District Court did not reach when it vacated the award. The consolidation order was only the beginning of the process, since six weeks later the District Court appointed an umpire (App. C, pp. 25a-26a), and two years later the District Court ruled on cross-motions to vacate and confirm the arbitration award (App. B, pp. 13a-24a). Thus, a "final decision" might have arisen at any of these points in time. The District Court itself was uncertain. (App. B, pp. 21a-22a). No judgment was entered in 1991, and the court retained jurisdiction. Of course, if the proceeding had been termed "embedded," then the result would have been clear. No appeal would have been appropriate until the District Court issued a final decision under Sections 9 or 10 of the FAA.

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parties or authorization in the arbitration clause. A sampling of these opinions from a variety of circuits includes: *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (citing *Boeing* and noting that consolidation, absent the parties' agreement, is improper even when consolidation would promote the expeditious resolution of related claims); *American Centennial Ins. v. National Casualty Co.*, 951 F.2d 107, 108 (6th Cir. 1991) ("a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation"); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) ("absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curiam) ("the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration"); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) (same); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir.) (same), *cert. denied*, 469 U.S. 1061 (1984).

Indeed, in the Second Circuit and other circuits, deciphering when an appeal of an order relating to arbitration is permitted is metaphysical at best. For example, in *Filanto, S.P.A. v. Chilewich International Corp.*, 984 F.2d 58 (2d Cir. 1993), the question presented was "whether such an order [requiring arbitration] is appealable when it is entered in a lawsuit brought on the underlying dispute." *Id.* at 59. The complaint was not dismissed when arbitration was ordered, but the case was nonetheless marked closed. It was clear on the record that the district court intended to enter a final judgment. Since the court did not dismiss the complaint, and the plaintiff had sued on a contract even though the whole dispute was deemed subject to arbitration, the proceeding was held "embedded" rather than "independent" and an appeal was improper. *Id.* at 60. *Compare Matter of Chung and President Enters. Corp.*, 943 F.2d 225 (2d Cir. 1991).

A comparison of decisions across circuits and the facts of the present case suggest that the line between "independent" and "embedded" actions is opaque rather than bright and that no reasoned basis exists for the distinction. However, absent guidance from this Court, the plainly inconsistent results continue based on outmoded labels. *See, e.g., Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994) (even though district court dismissed remaining claims in embedded proceeding, order to arbitrate was not appealable); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (adopting rule that an embedded proceeding may not give rise to a final decision subject to immediate review, even when all the claims in which the arbitration issue is embedded are resolved); *Campbell v. Dominick & Dominick, Inc.*, 872 F.2d 358, 359 (11th Cir. 1989) (dismissing appeal from order compelling arbitration of all substantive claims in embedded action); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1273-76 (6th Cir. 1990) (finding appellate jurisdiction in embedded proceeding where order com-

pelling arbitration dismissed action rather than merely staying it); *Corion Corp. v. Chen*, 964 F.2d 55, 59-60 (1st Cir. 1992) ("*Corion*") (appeal of an order to arbitrate is premature even though the only substantive claim is for declaratory relief); *American Casualty Co. v. L-J, Inc.*, 35 F.3d 133, 139 (4th Cir. 1994) ("*American Casualty*") (same). Indeed, in *American Casualty*, the Fourth Circuit held:

> Dismissal of this appeal is particularly appropriate because the lower court clearly intended to retain its jurisdiction over the matter when it ordered the case "statistically stayed pending the outcome of arbitration between the parties." Its order merely rendered the case inactive until after the arbitration had resulted in an award at which time it could then enter a final judgment with respect to the very allegations raised by American in its first and last counts. *See Corion*, 964 F.2d at 56-58. An order compelling arbitration "in no way resolves the merits of the claims sent to arbitration;" rather, such an order is similar to the "hundreds of case-management orders in a large piece of litigation, any of which may affect the outcome, and almost none of which is appealable." Because a district court has review powers over the arbitral award, any assertedly erroneous actions by the district court (including the order compelling arbitration) are reviewable on appeal after the arbitration process has been completed.
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> —*American Casualty*, 35 F.3d at 139 (citations omitted).

It is against this background that Petitioners in the instant case faced the question of when an appeal was appropriate under § 16 of the FAA—a new statute which on its face was intended to promote arbitration and delay appeals until the conclusion of the arbitration proceeding. The Second Circuit itself has noted that the question of appealability of arbitration orders is "recurring." *Filanto*, 984 F.2d at 59. There can be no doubt that appeal-

ability of such an order is subject to considerable doubt and uncertainty. Indeed, as one court of appeals stated before the 1988 amendments to the FAA:

> The area of appealability of arbitration orders is one of "medieval if not Byzantine pecularities [sic]" and a "source of understandable confusion to the bar" where the law is constantly changing. In such an area of law, counsel cannot be expected to anticipate the twists and turns that the law may take.
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> —*Snyder v. Smith*, 736 F.2d 409, 414-15 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984) (citations and footnote omitted).

That Byzantine quality continues to exist under § 16 and will continue to exist until this Court clarifies the question of when a decision is "final" under § 16(a)(3).

B. The Present Distinction Between Independent and Embedded Actions Permits a Litigant to Affect the Other Party's Rights of Appeal at Will.

As noted above, several circuit court decisions have indicated that the appealability of an order compelling arbitration often turns on such vagaries as which party files suit. *See, e.g., American Casualty*, 35 F.3d at 137; *Corion*, 964 F.2d at 59-60. The independent-embedded distinction thus permits parties to engage in strategic pleading to permit or deny appealability of the arbitration issue at an early stage. It should not be the case that such significant results could turn on artful pleading or races to the courthouse.

For these various reasons, this case presents serious questions that require this Court's intervention to provide guidance on when a decision compelling arbitration is "final" under § 16(a)(3).

II. BY IGNORING THE AUTHORITY GRANTED THE DISTRICT COURT UNDER § 10 OF THE FAA AND MISAPPLYING THE LAW OF THE CASE DOCTRINE, THE DECISION BELOW NULLIFIES § 10 AND CREATES A CONFLICT BETWEEN CIRCUITS ON THE ISSUE OF CONSOLIDATION.

The emergence in recent years of alternative dispute resolution as a popular and common method of resolving disputes between parties has raised numerous procedural questions regarding the interpretation of the FAA. As discussed above, the interpretation of § 16 of the 1988 amendments to the FAA presents one significant area demanding resolution by this Court. Other questions of procedure—for example, the obligation of a district court to deny the consolidation of two separate arbitrations where the provisions of the arbitration agreement do not require consolidation and there has been no consent to consolidated proceedings by the parties—also lay at the heart of this case. The majority of cases addressing this consolidation issue have rejected the Second Circuit's long-standing precedent in *Nereus*.

The Second Circuit's 1993 decision in *Boeing* brought that court into line with these majority decisions and overruled its contrary ruling in *Nereus*. District courts within the Second Circuit welcomed *Boeing*'s clarification on the issue whether a district court can require consolidation absent agreement of the parties. The district court in *Active Glass Corp. v. Architectural & Ornamental Iron Workers Local Union 580*, 875 F. Supp. 245 (S.D.N.Y. 1995), applied the ruling in *Boeing*, finding that the decision "made clear that '[t]he district court is without authority to consolidate the two actions based upon the mere fact that the disputes contain similar or identical issues of fact and law,' " and " 'that the FAA does not authorize consolidation of arbitration proceedings unless doing so would be in accordance with the terms of

the agreement.'" *Id.* at 252 (citing *Boeing*, 998 F.2d at 70-71).[2]

In the present case, however, the Second Circuit turned the holding in *Boeing* on its head, refusing to accept the District Court's ruling that *Boeing* presented a controlling change in law which required it to revisit and reverse its earlier consolidation order. In addition, the Second Circuit rendered § 10 of the FAA a nullity by ignoring the District Court's authority to vacate the award under § 10(a)(4) of the FAA in a situation where a change in law invalidated its original consolidation order. The Second Circuit's interpretation on this issue disregarded the authority granted under § 10 and left the District Court without any avenue by which to correct an earlier ruling which was wrong. Finally, the decision below also ignored this Court's decisions in *Byrd* and *Volt*, by concluding that the District Court did, indeed, have power to consolidate under some unexplained "equitable powers" and that *Nereus*, to the extent it relied on the court's equitable powers had not, in fact, been overruled. In short, the Second Circuit's decision nullifies an important provision of the FAA, squarely conflicts with decisions of other circuit courts, and will create great confusion for subsequent courts addressing the question of consolidation. To remedy this conflict, this Court should grant this petition for writ of certiorari and reverse the decision of the Second Circuit below.

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[2] *Active Glass* also cited *Boeing's* statement that "[e]ach of our sister courts to have considered the question since [certain Supreme Court decisions] has held that district courts do not have the authority under the FAA to consolidate arbitrations absent the parties' consent." *Active Glass*, 875 F. Supp. at 252. Apparently, the district court in *Active Glass* interpreted *Boeing* as completely overruling the Second Circuit's contrary position in *Nereus*.

A. The Second Circuit's Decision Nullifies the Powers Granted the District Court Under § 10 of the FAA and Conflicts With Established Precedent Interpreting a District Court's Power Under the Section.

Section 10 of the FAA grants a district court the power to vacate an arbitration award, among other circumstances, "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). The District Court here recognized this authority as a valid alternate basis for its decision to vacate the arbitration award, which resulted from an earlier order to arbitrate which had become invalid as a result of the Second Circuit's *Boeing* decision. As explained by the District Court:

> I think that these rather special circumstances require vacatur of the award and a remand for separate arbitrations *de novo*, whether or not the case falls precisely within one of the grounds for vacatur specified in § 10 of the FAA. But if such a ground is necessary to the result, I conclude that the arbitrators in the consolidated arbitration exceeded the powers conferred upon them by the parties' contracts, in violation of § 10(d) [10(a)(4)]. To be sure, the arbitrators acted in fulfillment of this Court's Order; but *Boeing* makes it clear that, in all innocence, I exceeded my powers; and since the arbitrators derived their powers from my order, so did they.
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> —App. B, pp. 23a-24a.

In short, the District Court bolstered its conclusion that a traditional exception to the law of the case doctrine provided it with authority to revisit its earlier ruling with explicit authority to vacate the award founded in the FAA. Well-established judicial precedent further supports the District Court's interpretation of its authority under § 10 to vacate an award when arbitrators exceed their powers by conducting proceedings contrary to the parties' arbitration agreement. *See Avis Rent A Car Sys. v. Garage Employees Union*, 791 F.2d 22, 25 (2d Cir. 1986) ("award will not be enforced if the arbitrator is not

chosen in accordance with the method agreed to by the parties") (citation omitted); *Blue Bell, Inc. v. Western Glove Works, Ltd.*, 816 F. Supp. 236, 240 (S.D.N.Y. 1993) ("Awards which cannot be based upon the parties' contract will be vacated under Section 10(d) [10(a)(4)]"). *Accord, Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223 (4th Cir. 1994) (vacating award); *Waterspring, S.A. v. Trans Mktg. Houston, Inc.*, 717 F. Supp. 181 (S.D.N.Y. 1989).

Similar to its misapplication of the law of the case doctrine discussed below, the Second Circuit disregarded the power vested in the District Court under § 10(a)(4) and in essence ignored this issue. The decision below thus conflicts with established precedent holding that an award is properly vacated under § 10(a)(4) when inconsistent with the parties' arbitration agreement. *See Chasser v. Achille Lauro Lines*, 844 F.2d 50, 55 (2d Cir. 1988), *aff'd*, 490 U.S. 495 (1989).[3] According § 10 nothing more than passing mention in a footnote, the Second Circuit effectively rendered § 10(a)(4) meaningless. Although § 10(a)(4), on its face, appears to grant a district court precisely that authority exercised below, the Second Circuit's decision below in effect means that neither § 10, nor the law of the case doctrine, provides a district court with any avenue by which to go back and correct an earlier ruling which has become erroneous as a result of a change in law prior to final judgment in the case.

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[3] Other Circuits which have addressed this question agree with this position. *Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258 (9th Cir. 1992) (vacatur of award necessary when arbitrators exceeded their authority under § 10(d) [now § 10(a)(4)] by failing to provide findings of fact and conclusions of law as provided by the parties' contract); *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991) (award vacated as exceeding arbitrators' authority where parties' agreement provided for award by three arbitrators, but award rendered by only two).

More importantly, the Second Circuit decision conflicts with the clear dictates of this Court's decisions in *Volt* and *Byrd* requiring arbitrations to be conducted according to the precise terms of the parties' agreement even where the result is piecemeal litigation. As such, the power of the District Court to rely on § 10 as a ground to vacate an award made through the incorrect interpretation of the parties' arbitration agreement presents an important question of law which has not yet been addressed by this Court and for this reason, a writ of certiorari should issue.

B. The Second Circuit's Erroneous Application of the Law of the Case Doctrine Led It to an Incorrect Decision at Odds With Other Circuits and This Court.

The law of the case doctrine has deep-seated roots in this Court's judicial history. *See Messinger v. Anderson,* 225 U.S. 436 (1912). Well-established precedent from this Court has been sufficiently straightforward that lower courts have followed it with little deviation over the last century. Indeed, this Court has recently reaffirmed that a district court holds the power to revisit its earlier rulings before final judgment. *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817 (1988); *accord, Arizona v. California,* 460 U.S. 605, 618 (1983) (dictum). In *Christianson,* this Court explained the power of a district court to revisit its earlier rulings:

> [T]he law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power." *Messinger v. Anderson,* 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L. Ed. 1152 (1912) (Holmes, J.) (citations omitted). *A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance,* although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was

> "clearly erroneous and would work a manifest injustice." *Arizona v. California, supra,* 460 U.S., at 618, n.8, 103 S.Ct., at 1391, n.8 (citation omitted). Thus, even if the Seventh Circuit's decision was law of the case, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was "clearly wrong" it was obliged to decline jurisdiction.
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> —*Christianson,* 486 U.S. at 817 (emphasis supplied).

See also Higgins v. California Prune & Apricot Grower, Inc., 3 F.2d 896, 898 (2d Cir. 1924) (citing *Messinger*). The Second Circuit has applied the law of the case doctrine and upheld a district court's reversal of its earlier opinion prior to a final judgment. *Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 248 (2d Cir. 1979). In *Crane,* some eight years after the start of litigation, following trial on the merits, the court held that an earlier decision was properly revisited in light of a change in the law.

Other Second Circuit decisions reinforce the discretionary power of the district court to revisit its prior rulings before final judgment. *See DiLaura v. Power Auth. of the State of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992) (citing *Arizona v. California,* 460 U.S. 616 (1983)). The major grounds justifying reconsideration are "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.), *cert. denied,* 113 S. Ct. 67 (1992) (citations omitted). As summarized by the *DiLaura* court, the "law of the case [doctrine] 'permits a change of position if it appears that the court's original ruling was erroneous.' " *DiLaura,* 982 F.2d at 77.[4] The Second Circuit has not deviated

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[4] The law of other circuits is in accord. *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1197 (11th Cir.), *cert. denied,* 114 S. Ct. 604 (1993) ("law of the case 'permits

from this rule of law until its decision below. It is within the framework of this well-established line of cases that the decision below must be analyzed.

Despite the obvious relevance and clear mandate of these decisions, the Second Circuit's decision below failed even to consider or address any of them in ruling that the District Court abused its discretion in revisiting and reversing its earlier consolidation order. Instead, the court below relied on the Reinsurers' failure to appeal the consolidation order to reach its conclusion—despite the fact that nothing in any law of the case precedent suggests that an immediate appeal is necessary. In addition, the court below reached its decision based on a conclusion that *Boeing* had not, in fact, changed the law of the Circuit. This conclusion not only lacked any legal basis, but created an irreconcilable conflict, not only between the Second Circuit and other Circuits, but within the Second Circuit itself on the issue of consolidation.

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a change of position if it appears that the court's original ruling was erroneous' "); *Morris v. American Nat'l Can Corp.*, 988 F.2d 50, 52 (8th Cir. 1993) ("the law of the case does not apply when an intervening decision from a superior tribunal clearly demonstrates the law of the case is wrong"); *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 810 (9th Cir. 1991) ("law of the case does not bar reconsideration of an issue when 'controlling authority has since made a contrary decision of the law applicable to such issues' "); *Miles v. Kohli & Kahliher Assocs., Ltd.*, 917 F.2d 235, 241 n.7 (6th Cir. 1990) (same); *Barrington Press, Inc. v. Morrey*, 816 F.2d 341, 342 n.2 (7th Cir.), *cert. denied*, 484 U.S. 906 (1987) (same); *United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir.), *cert. denied*, 479 U.S. 914 (1986) (the law of the case rule is to be applied at the sound discretion of the court to effectuate the proper administration of justice); *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983) (law of the case doctrine is not a barrier to correction of judicial error; it is a rule of judicial convenience and utility and yields to adequate reason, allowing judge to reconsider decision so long as case remains in his court); *Zichy v. City of Philadelphia*, 590 F.2d 503, 508 (3d Cir. 1979) (court has a duty to apply a supervening rule of law despite prior decisions to the contrary when the new legal rule is valid and applicable to the issues of the case).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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